PETITION FOR A WRIT OF
CERTIORARI TO THE POLICE
COURT OF THE CITY OF
LOUISVILLE

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MAY 1 1959
JAMES R. BROWNING, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 91

SAM THOMPSON, Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

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SAM THOMPSON, - - - - - - - *Petitioner,*

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CITY OF LOUISVILLE, and
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PETITION FOR A WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

May it please the Court:

Petitioner prays that a writ of certiorari issue to review two judgments of the Police Court of the City of Louisville, Kentucky (herein called the "Police Court"), which judgments were rendered in the above-entitled case on February 3, 1959, and were entered February 4, 1959.

CITATIONS TO OPINIONS BELOW.

The Police Court rendered no opinion. The judgment of Jefferson Circuit Court in a *habeas corpus* proceeding brought for the purpose of obtaining stay and bail pending review by this Court was rendered

February 4, 1959 (R. 78).* Its opinion, which is unreported, is printed in Appendix B hereto, *infra,* p. 29. The majority and dissenting opinions of the Kentucky Court of Appeals on appeal in the *habeas corpus* proceeding are respectively printed in Appendix B hereto, *infra,* pp. 35, 40. They are not yet reported. The majority opinion was rendered March 13, 1959; the dissenting opinion was rendered April 10, 1959.

JURISDICTION.

The judgments of the Police Court were entered on February 4, 1959 (R. 75-77), petitioner's motion for new trial having been overruled February 3, 1959 (R. 74). The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3), since the judgments of the Police Court have infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

Under Kentucky law no civil action for malicious prosecution or wrongful arrest can be maintained unless and until the original criminal case terminates in favor of the accused. On the other hand, no Police Court conviction is reviewable on the merits in any State court, by any mode of review (with one exception not applicable in this case) if the sentence is a fine of

*The transcript of evidence and other pertinent portions of the record are printed in Appendix C hereto, and the record references contained herein are references to pages in that Appendix.

less than $20. The petitioner has been subjected to two successive arrests on petty misdemeanor charges for the sole reason that the Louisville police have resented his action in retaining counsel and demanding a hearing on a previous disorderly conduct charge; and in these two successive cases the Police Court Judge (no jury trial being allowed in such cases under Kentucky law) has found the defendant guilty despite the total absence of any evidence of guilt. In the second of these cases the Police Court has imposed two $10 fines, which are too small to be reviewable in any state court. The Federal questions are:

1. Whether such convictions, being unsupported by any evidence of guilt, constitute wholly arbitrary official action and thereby violate the due process clause of the Fourteenth Amendment.

2. Whether the failure of Kentucky to provide corrective judicial process whereby Federal constitutional objections to such convictions can be adjudicated, violates the due process clause of the Fourteenth Amendment.

3. Whether such convictions deny petitioner all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. Whether, in view of the fact that the said arrests were made in reprisal for petitioner's insistence on his Federally protected rights to retain counsel and demand a trial on the earlier misdemeanor charge, the foreclosure of effective redress against such arrests

infringes said right to counsel and right to a judicial hearing, and thereby violates the due process clause of the Fourteenth Amendment.

STATUTES INVOLVED.

Petitioner was convicted of loitering under §§85-12 and 85-13 of the Ordinances of the City of Louisville, printed in Appendix A, *infra*, pp. 27-28, and was convicted of disorderly conduct under §85-8 of said Ordinances, printed in Appendix A, *infra*, p. 27.

STATEMENT.

Although the case now before the Court was initiated by an arrest made January 24, 1959, full understanding of the issues requires reference to two earlier misdemeanor cases which involved arrests made January 10 and 14.* The facts of these earlier cases, in so far as they are pertinent, appear in the present record.

On January 10, petitioner was arrested without a warrant by officer F. Fletcher of the Louisville Police Force and was charged with disorderly conduct. He retained counsel and on January 12 appeared in Police Court and demanded a trial, whereupon the case was assigned for trial January 27 and he was released on bond pending trial (R. 69).†

*All dates given herein are in 1959.

†On January 27th this charge was filed away (R. 70).

At about 3:45 P.M. on January 14, two days after being thus released, petitioner was sitting in the colored waiting room of the Union Bus Station in Louisville, waiting for a bus to Buechel, Kentucky, a suburb of Louisville, where he lived. Officer Fletcher and officer Suter, another Louisville policeman, entered the waiting room and arrested him without a warrant, charging him with the crimes of vagrancy and loitering. After his arrest, while conveying him to Police Headquarters, one of said policemen subjected petitioner to verbal abuse and some slight physical abuse, giving him to understand that he had been thus re-arrested because he had retained counsel, pleaded not guilty and demanded a trial on the previous disorderly conduct charge, which would put officer Fletcher to the trouble of appearing in court to testify in that case (R. 69-70).

Petitioner again retained counsel, pleaded not guilty and demanded a trial, whereupon this case was assigned for trial January 20 (R. 69-70). At that trial the sole witness for the prosecution was officer Suter. He testified that he had "charged Thompson with vagrancy and loitering because he didn't give me any proof as to working anywhere". (R. 37). He also said petitioner had been sitting with a man named Robinson who had a bottle of wine and that petitioner had wine on his breath (R. 36-37).

The prosecution, as a part of its case in chief, attempted to introduce proof that petitioner had a previous felony record, but this proof was excluded when it was discovered that the felony record belonged to

another man of the same name (R. 37-39). The prosecution was however allowed to show, over objection, that petitioner had been previously arrested more than once (R. 40).

Officer Suter said he had found no money on petitioner (R. 37) but never testified that he had searched petitioner or asked him whether he had bus fare. Later, in response to a leading question by the Court, he said that petitioner "had no money" and that he "didn't see any" bus ticket (R. 44). He admitted that he did not know whether a Buechel bus was about to leave (R. 44) and that petitioner had told him he was in the station to catch a bus (R. 43).

A motion to dismiss having been overruled, petitioner adduced the following proof:

(a) His own testimony that he owned real property in West Buechel; that he was employed; that he had been in the bus station only a few minutes before his arrest; that he had had a bus schedule in his pocket; that no bus tickets were required; that he had not spoken to Mr. Robinson or taken any of his wine; that he did nothing in the bus station except get a drink of water and talk to Miss Alma Ford, a neighbor and frequent fellow-passenger; that officer Suter had not searched his pockets or asked him if he had bus fare; and that he did not have bus fare. (He recounted his movements and activities prior to his arrest in circumstantial detail, and showed where he had gotten the bus fare (R. 47-58).)

(b) The testimony of Dr. Wynant Dean, a physician, that petitioner had done housework for him and

his father for the past thirty years and was so employed at the time of his arrest (R. 45-47).

(c) The testimony of Miss Ford, who fully corroborated petitioner's testimony as to what had happened in the bus station; testified that he had been there only four or five minutes before officer Suter came in, and that an appropriate bus was scheduled to leave at 3:45 P.M.; and testified that petitioner had not spoken to Mr. Robinson and had no wine or liquor on his breath (R. 58-60).

(d) The testimony of Mr. Robinson, who testified that he and petitioner had had no conversation and that he had given petitioner none of his wine (R. 61-62).

The Court found petitioner guilty of loitering, saying (R. 63):

> "The officer has testified he has arrested this man before on similar charges and I am basing my decision on that" (R. 63).

The Court rejected a request by petitioner's counsel to reserve decision until the testimony could be transcribed and a brief filed (R. 62). The Court proposed to fine petitioner $10 on the loitering charge; but, fines under $20 not being appealable, the Court stated its willingness to impose a $20 fine on that charge. An appealable $20 fine was thereupon requested and imposed.

On the vagrancy, the Court proposed to file the charge away, which would have had the effect of preventing a malicious prosecution action against the arresting officers, because of the lack of a final adjudication of the criminal case. *Van Arsdale* v. *Caswell*, Ky., 311 S. W. 2d 404 (1958). Petitioner having objected to this and requested a dismissal, the Court (without further testimony or argument) found petitioner guilty of vagrancy and, though willing to impose a $10 fine, acceded to petitioner's request for an appealable judgment and sentenced petitioner to 30 days in jail (R. 62-64). An appeal was perfected forthwith and petitioner was released on bond.*

At 6:53 P.M. on January 24, four days after this trial, petitioner was again arrested without warrant while waiting for a bus to his home. This time he had taken the precaution of not waiting in the bus station.† Instead, he had waited in a small tavern, the Liberty End Cafe, a few blocks east of the station and about half a block from where the bus stops (R. 19, 22). He was charged with loitering and disorderly conduct, the case being tried February 3.

The testimony on this trial (undisputed except as noted) was as follows: About 6:20 P.M. on January 24 petitioner entered the Liberty End Cafe. He bought and consumed a dish of macaroni and a glass of beer, these being served to him by a waiter or waitress other

*On the appeal the case was tried *de novo* before a jury in Jefferson Circuit Court on March 18th. A verdict of acquittal was returned on peremptory instruction by the Court.

†"Mr. Suter always arrests me when I go there [to the bus station] to catch the bus to go to Buechel" (R. 54).

than William Marks, the manager. The next bus he could catch was scheduled to leave the station at 7:30. At 6:53 he was standing between the bar and some booths which were located along the opposite wall, talking to the people in one of the booths and patting his foot or doing a shuffle dance to the music of the juke-box. Petitioner's conduct was in no way objectionable or disorderly, and Mr. Marks (who was in charge of the place) did not object to his presence there (R. 10).

At 6:53 P.M. officers Lacefield and Barnett entered the cafe and saw petitioner. They asked Mr. Marks how long petitioner had been there and Mr. Marks said a little over half an hour. Officer Barnett asked Mr. Marks if petitioner had bought anything and Mr. Marks (according to his own testimony (R. 25-26)) said *he* had not sold petitioner anything. Officer Lacefield quoted Mr. Marks as saying that petitioner "had not bought anything" (R. 2). Officer Barnett said to Mr. Marks that petitioner "had been in something down at the bus station" (R. 26).

Officer Lacefield then went to petitioner and asked why he was there. Petitioner said he was waiting for a bus. The policeman, professing to believe that the bus to petitioner's home did not run anywhere near the Cafe and that petitioner had not bought anything in the Cafe (both of which beliefs were shown by the uncontradicted evidence to be contrary to fact) arrested him for loitering. Officer Lacefield testified that the

arrest was also based partly on the fact that petitioner was "dancing" (R. 2, 8).*

Petitioner had a bus schedule and bus fare in his pocket but was not asked about this, or about his employment. No one else was arrested (R. 9) and, so far as appears, none of the other occupants of the Cafe were interrogated.

After his arrest for loitering, petitioner argued with the officers. Solely for this reason (although his argument was respectful and not belligerent) he was charged with disorderly conduct as well (R. 2-3, 24-25).

After receipt of the foregoing evidence, plus the same evidence of petitioner's employment and real estate ownership as in the January 20 trial, defense counsel filed a motion to dismiss on Federal Constitutional grounds (R. 30, 71) and requested an opportunity to argue the motion on the basis of the transcript (R. 31). The motion was overruled (R. 30). Petitioner was then found guilty of both charges. He was fined $10 on each charge, the Court not offering this time to impose appealable sentences (R. 31).

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*On its own motion, the Court asked Officer Lacefield whether the Cafe had a "license for dancing" (R. 9). The prosecution then introduced evidence that the Cafe had no "dance permit" (R. 11). The efforts of petitioner's counsel to ascertain the nature of the dance license requirement, and to find out whether it would be an offense to dance in a place not licensed for dancing, were unavailing (R. 19). An offer to prove that the lack of a dance license would not render petitioner's solo activities unlawful was rejected (R. 37).

HOW FEDERAL QUESTIONS WERE RAISED.

The Federal questions here presented were specifically raised at the February 3 trial by a written motion to dismiss at the close of the prosecution's case (R. 13-14, 33-34), and again by a written motion to dismiss at the close of the whole case (R. 30, 71), and still again by a written motion for new trial (R. 32, 74). Each of said motions was overruled without opinion or other explanation. Petitioner's Federal claims were thus made at the earliest opportunity and were renewed at each stage of the proceedings below.

UNAVAILABILITY OF STATE COURT REVIEW.

Since it is somewhat unusual to seek review in this Court of the judgment of a city police court, it is appropriate to show that no review of the merits of the Federal claims is available in any Kentucky court and that the Police Court is therefore the highest court of the State in which a decision can be had. This will clearly appear from a brief review of the proceedings subsequent to February 3.

Police Court fines of less than $20 not only are not appealable to any Kentucky court, but are not reviewable on writ of prohibition where, as here, the ordinances on which the prosecution is based are not attacked. KRS §26.080. In such cases there is no statutory provision for stay and bail pending review by a higher court. It was however necessary for petitioner to obtain a stay and bail pending application for

review in this Court because, had he remained in jail for 10 days, he would have automatically served out his fines—at the rate of $2.00 a day—and the case would have become moot long before this Court could have ruled on it. KRS §26.450 and City of Louisville Ordinances §3-13.

Petitioner therefore applied to the Police Court for stay and bail (R. 31, 72-73). A stay was granted for 24 hours but that Court, lacking statutory authority, refused a further stay and on February 4 entered the two judgments complained of (R. 75-77). That same day petitioner applied for and obtained in Jefferson Circuit Court a common law writ of *habeas corpus* granting him his liberty on $35 cash bail, pending review here. The opinion of Circuit Judge Lawrence Grauman (Appendix B, *infra*, pp. 29-30, 32) said in part:

> "Petitioner, Sam Thompson, * * * claims that the convictions deprive him of his liberty and property without due process of law, in violation of the 14th Amendment to the United States Constitution.
>
> "An examination of the record (including the two Police Court transcripts and the two judgments of conviction referred to above, which have been made available to this court and are now ordered filed as a part of the record) shows that these Federal Constitutional claims are substantial and not frivolous.
>
> "Petitioner has no remedy in the Kentucky courts. The $10 fines are too small to be appealable. Review by way of the statutory writ of prohibition

(KRS 26.080) is not available, since petitioner is not here questioning the legality of the loitering and disorderly conduct ordinances on which the convictions were based. The convictions can not be tested by *habeas corpus,* since the Police Court's jurisdiction over the person and the subject matter is not questioned. Petitioner's only recourse is, therefore, to seek review on certiorari in the United States Supreme Court, for which he may petition within 90 days after the February 3, 1959, judgments.

* * * * * * *

"The petitioner Thompson, through counsel, vigorously insists that there is no evidence upon which conviction and sentence by the Police Court could be based (there appears to be merit in this contention) * * *."

The respondents appealed this decision to the Kentucky Court of Appeals (the highest court of the State). That Court agreed that stay and bail should be granted, declaring (Appendix B, *infra,* pp. 30-31, 32):

"The opinion of Hon. Lawrence Grauman, Judge of the Jefferson Circuit Court, which granted the writ of habeas corpus, recites that an examination of the records of the police court, including the transcripts of evidence of the two trials, 'shows that these federal constitutional claims are substantial and not frivolous.' The majority of this court agree with this statement of Judge Grauman.

* * * * * *

"Appellee appears to have a real question as to whether he has been denied due process under

> the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari."

The Court of Appeals held that Circuit Court lacked the power to grant stay and bail but that "in extreme cases like the one at bar" the Court of Appeals would itself grant relief, acting under the general supervisory power granted to it by §110 of the Kentucky Constitution.* The Police Court was therefore ordered to grant stay and bail on substantially the same terms as had been prescribed in Circuit Court.

The highest court of Kentucky has thus held that petitioner has no way of reviewing the merits of the case in any State court, despite the fact that serious Federal due process questions have been raised. But on the other hand it has rendered its considered judgment that petitioner's Federal claims are so substantial as to justify the grant of highly extraordinary interim relief to enable him to press them in this Court. Though it considers itself powerless, under Kentucky law, to set aside the convictions, the Court has done what it could—within the limitations of the Kentucky precedents—to clear the way for review here.

*"The Court of Appeals * * * shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

REASONS FOR GRANTING THE WRIT.

As a preliminary matter we state a perfectly obvious proposition: Neither petitioner's February 3d conviction, which is directly involved here, nor his January 20th conviction, was based on any evidence whatever. We do not offer this proposition as an independent reason for granting the writ. For present purposes it is not necessary to claim that this Court must review *every* case in which a state court of last resort enters a judgment without supporting evidence. We simply assert the proposition as a premise for the discussion below.

Even under the broad and vaguely worded legislative prohibitions against loitering, disorderly conduct and vagrancy, there was not the shadow of evidence that could have justified the convictions. It was not loitering for petitioner to sit in the bus station for five minutes just before his bus to his home was due to leave, there being no objection by the person in control of the premises,* whether or not petitioner had wine on his breath and whether or not he was talking to a man with a bottle of wine in his pocket. It was not vagrancy for petitioner to earn only $12 a week,† and

*There is of course an implied invitation to the general public to enter places of public accommodation such as bus stations and cafes. 52 Am. Jur., tit. "Trespass", § 39.

†Petitioner proved that he could live on $12 a week, since he had no rent to pay and his other expenses were modest. The Police Court Judge took "judicial notice" of the "fact" that $12 would not suffice to pay for the beer and whiskey which he said petitioner bought (R. 18). Except for this remarkable excursion, petitioner's testimony on this point stands uncontradicted.

to carry with him no evidence of his employment. In this country personal identification papers have never been required of civilians, even in wartime. It was not loitering for petitioner to wait for his bus in the Liberty End Cafe for half an hour or so (there being no objection by the person in control of the premises) whether or not petitioner ate or drank anything, and whether or not he patted his foot to the music of the juke box. It was not disorderly conduct for petitioner to argue with the police, in a respectful manner, about his illegal arrest.

The lack of evidence to support the convictions will be clear from a review of the relatively short record (Appendix C hereto). It has been recognized both by Judge Lawrence Grauman of Jefferson Circuit Court and by Judge Porter Sims, writing for a majority of the Kentucky Court of Appeals (see Appendix B, *infra*, pp. 32 and 36). Considering this preliminary proposition to be established, we now state the reasons for granting the writ.

Conflict With Applicable Decisions of This Court.

Petitioner's situation is that he cannot walk the streets of Louisville, or even innocently wait for a bus to his home, without being arrested on sight. Though he resists charges placed against him and proves beyond any doubt that they are unwarranted, he is nevertheless found guilty. As soon as he takes an appeal from one conviction he is rearrested, again without cause; and, after the form of a trial, he is again con-

victed—this time with a sentence too small for appeal. The conviction immunizes the arresting officers from civil liability, for under Kentucky law the unappealable judgments of conviction, unless set aside, will stand as a complete bar to petitioner's only effective remedy and deterrent—an action for malicious prosecution. *Van Arsdale* v. *Caswell, supra,* and cases cited at 311 S. W. 2d 406. As a result petitioner is subjected to the unrestrained and arbitrary will of the Louisville police.

Thus the Police Court decision is not simply a ruling that petitioner must pay $20 in fines to the City of Louisville. It is a virtual sentence of outlawry.

In *Wolf* v. *Colorado,* 338 U. S. 25, 27-28 (1949) this Court declared:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

To the same effect, see the opinion of Jackson, J., in *Irvine* v. *California*, 347 U. S. 128, 132 (1954). These cases involved unlawful searches. They apply *a fortiori* to an unlawful arrest.

And in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369-370 (1886) this Court held:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.
>
> "* * * the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The power of the police to effect summary arrests is not questioned. But due process requires that some effective procedure be provided for redress against abuse of that fearsome power. This Court has upon occasion upheld summary official action, taken without prior notice and opportunity for hearing; but in each such case the validity of the action was upheld solely because judicial review on the merits was available at some later time. See *Lawton* v. *Steele*, 152 U. S. 133, 142 (1894); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 315-320 (1908), quoting with approval the opinion of Holmes, J. in *Miller* v. *Horton*,

152 Mass. 540, 26 N. E. 100 (1891). And when such review on the merits is not available, due process is held to have been denied. *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, 197 (1933).

Nor can it be said that the Police Court trial itself satisfies this due process requirement. The convictions, being devoid of evidence to support them, are a nullity. Even in an alien deportation case, and even on collateral attack, this Court has held (*U. S. ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103, 106 (1927):

> "Deportation * * * on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus.*"

The fact that the Police Court Judge is a judicial rather than an administrative officer is immaterial. Where, as here, the record shows that a court has acted wholly arbitrarily and irrationally, its action is open to review on constitutional grounds. As was said in *Mooney* v. *Holohan,* 294 U. S. 112, 113 (1935):

> "[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial * * *."

See also *Moore* v. *Dempsey,* 261 U. S. 86 (1923) (due process held denied where "the whole proceeding is a mask").

The three judges who dissented in the Kentucky Court of Appeals premised their position on the assumption that this Court is powerless to review the evidence, even for the purpose of showing that the

decision below was wholly arbitrary. The contrary has long since been established. As was said in *Fiske* v. *Kansas*, 274 U. S. 380, 385-386 (1927):

> "And this Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Additional authorities are cited in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (2d Ed., 1951), §108.

The denial of due process by the Police Court is aggravated by Kentucky's failure to provide corrective judicial process. Such failure has itself been declared by this Court to be a denial of due process. *Mooney* v. *Holohan, supra,* at 294 U. S. 113. In that case the Court declined to entertain an original petition for *habeas corpus* because the petitioner had not shown that he was without remedy in the California courts. In this case, however, the showing has been made.

It is quite clear that in Kentucky no corrective judicial process is available. No appeal is possible. *Merson* v. *Muir,* Ky., 284 S. W. 2d 811, 812 (1955). Review by statutory writ of prohibition under KRS §26.080(2) is not available because appellee does not here question the validity of the loitering and disorderly conduct ordinances. Review by common law writ of prohibition is likewise unavailable, even though

a Federal due process claim has been made. *Walters* v. *Fowler*, Ky., 280 S. W. 2d 523 (1955). Review by *habeas corpus* is unavailable because petitioner does not question the Police Court's jurisdiction to try the case. *Anderson* v. *Buchanan*, 292 Ky. 810, 168 S. W. 2d 48, 52 (1943); *Owen* v. *Commonwealth*, Ky., 280 S. W. 2d 524, 525 (1955), and cases there cited. Review by the Police Court itself by common law writ of error *coram nobis* would of course be fruitless where as here the grounds of review have already been presented to that court on motion for new trial and have been rejected by it.

The foregoing discussion makes it clear, we think, that the Police Court's decision is in conflict with applicable decisions of this Court, without consideration of the Police Court Judge's reasons for convicting the petitioner. But in fact the record contains clear indications that the January 20th and February 3d convictions were motivated by a desire to protect the arresting officers from civil actions. The prosecutor complained more than once that defense counsel was trying to "intimidate" the officers (R. 9, 63). At the January 20th trial the Judge, after hearing all the evidence, was ready to "file away" the vagrancy charge rather than to find the petitioner guilty (which would have been his clear duty if the evidence warranted a conviction). The defendant, exercising his right under *Van Arsdale* v. *Caswell, supra,* objected to such action, which would have avoided a final disposition of the vagrancy charge and would thus have foreclosed a malicious prosecution action. Thereupon the Judge,

instead of dismissing the charge, found the defendant guilty. And it is significant that at the February 3d trial the Judge did not offer the petitioner an appealable sentence (as he had done at the January 20th trial) but imposed fines too small for appeal—which, as has been noted, has the effect of foreclosing all possibility of a civil action against the arresting officer unless this Court reverses. It is hard to understand this action, except in terms of the court's desire to debar the petitioner from his civil remedy. The decision of the Police Court therefore conflicts in principle with *Tumey* v. *Ohio*, 273 U. S. 510 (1927).

The conviction of the petitioner without evidence of guilt, at least when coupled with the lack of corrective judicial process in Kentucky and the indications that the Police Court Judge was motivated by a desire to deny the petitioner his civil remedy against illegal and arbitrary arrest, is amply sufficient to justify review by this Court. But there is a further circumstance which renders the denial of constitutional right even more flagrant. The present convictions were the culmination of a series of reprisals taken upon the petitioner by the Louisville police because of his temerity in claiming his Federally protected rights to retain counsel and demand a trial after his January 10th arrest.

An unbroken thread connects the January 10 arrest with all the subsequent proceedings. On January 12 petitioner appeared with counsel, demanded trial and was released on bond (R. 69). On January 14 he was

arrested in the bus station and was told that his January 12 action was the reason for his arrest (R. 69). After appealing his January 20 conviction he was rearrested in the Liberty End Cafe January 24 by an officer who, according to the testimony of the cafe manager (a disinterested witness) stated that the petitioner "had been in something at the bus station" (R. 26).

That the Fourteenth Amendment due process clause guarantees the right to counsel and the right to a hearing is too well settled for argument. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930). The existence of a Federal right necessarily implies a Federally protected immunity against harassment, reprisal or punishment for exercise of that right. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Johnson* v. *Maryland*, 254 U. S. 51 (1920), and cases there cited; *N. A. A. C. P.* v. *Alabama, ex rel. Patterson*, 357 U. S. 449 (1958).

Importance of the Federal Questions.

Much more is involved here than the injustice done to this petitioner. The real question is whether anyone in Kentucky—and, indeed, in any state which imposes the same restrictions on criminal appeals and tolerates the same denial of corrective judicial process for redress of constitutional violations—can incur the personal displeasure of the police without subjecting himself to a course of harassment for which there is no remedy.

This very record discloses the nature of the police practices which have grown up under the umbrella of the existing legal situation. Both officer Suter, who arrested petitioner on January 14, and officer Lacefield, who arrested him on January 24, testified that the arrests were made in the course of a "routine check" or "fair check" of places of public accommodation (R. 2, 36). What this really means, as the testimony of Alma Ford shows in some detail (R. 59) is that the police enter such places as restaurants and bus stations and, without search warrants or arrest warrants, require whomever they please to account for their presence, show proof of employment, and otherwise explain their circumstances. If the explanation is unsatisfactory to the arresting officer an arrest is made and petty charges filed.

Such police methods are alien to our institutions. They constitute a standing threat to the freedom and privacy of all.

The gravity of the situation would be plain enough if the case involved only a dispassionate effort on the part of the police to prevent persons whom they considered undesirable from frequenting public places. But this case involves an even broader incursion upon the common right. This petitioner has been twice arrested and prosecuted not because of any diffuse attitude of official disapproval but for the specific reason that he retained counsel and demanded trial on a previous unfounded charge. To deny him all possibility of redress against such reprisal is to eviscerate the rights which lie at the very core of due process.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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